STATE OF MICHIGAN

COURT OF APPEALS

HENDRIX ROOSEVELT,

Plaintiff-Appellant,

v

CITY OF DETROIT, AMRU MEAH, and DAVID CLARK,

Defendants-Appellees.

UNPUBLISHED
October 13, 2011

No. 299166
Wayne Circuit Court
LC No. 07-731709-CZ

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm, but remand for entry of a judgment lien.

I. BACKGROUND

The subject of this dispute is the demolition of a building that was located at 8920 Mack, Detroit. In 2003, defendants sent by certified mail to the building's owners of record a dangerous building violation notice[1] and, after defendants held a hearing, a demolition notice. Plaintiff was not mailed these notices because he was not an owner of record, and never was prior to the institution of these proceedings.

Plaintiff made his first appearance in 2005, when he requested his first of two demolition deferrals.[2] When plaintiff completed the demolition deferral application, he listed the building's

[1] Defendants inspected the building and discovered that it was dilapidated, only had a half roof, was open to trespass, and was open to the elements.

[2] When plaintiff requested the first demolition deferral, defendants accepted the application and proceeded to treat plaintiff as the actual owner of the building. But, before the trial court and on appeal, defendants question whether plaintiff is the actual owner of the building. The trial court did not reach this issue. Instead, the trial court concluded that there was not a due process violation. Because we also conclude that there was not a due process violation, we do not address whether plaintiff is the actual owner, but assume that he was.

address as the location to send him notice. Defendants granted the deferral on the condition that the building would not be open to trespass and, if plaintiff failed to maintain the deferral condition, the building would be demolished without further notice. Notice was sent to plaintiff by certified mail at the building. However, the notice was returned unclaimed because plaintiff had moved from the building without providing a forwarding address. In 2006, defendants inspected the building and found that it remained open to trespass, contrary to the deferral condition.

In 2007, plaintiff requested a second demolition deferral. This time plaintiff provided 258 Riverside Drive as the address to send him notice. Defendants denied plaintiff's second deferral request and notice was sent to plaintiff by certified mail to both the building and 258 Riverside Drive. Both notices were returned as unclaimed and unable to forward. Subsequently, on September 4, 2007, defendants demolished the building.

In November 2007, plaintiff filed his complaint, alleging that the demolition of the building violated the Michigan constitution, federal due process under 42 USC § 1983, and resulted in gross negligence. In January 2008, defendants removed this case to federal court but, in October 2008, the federal court dismissed the § 1983 claim and remanded the remaining state law claims to circuit court. In circuit court, defendants moved for summary disposition on the remaining state law claims, arguing that plaintiff failed to state a claim because only the State of Michigan could be sued for monetary damages under the Michigan constitution and governmental immunity precluded any claims regarding gross negligence. In March 2009, the trial court granted defendants' motion for summary disposition and dismissed the case. In 2010, defendants motioned to reopen the case to allow a counterclaim for demolition costs, which was granted. Plaintiff failed to oppose defendants' motion for summary disposition on the counterclaim and, on June 15, 2010, the trial court granted defendants' motion for summary disposition, entered a judgment awarding defendant demolition costs, and closed the case.

II. ANALYSIS

This Court reviews the grant or denial of a motion for summary disposition under MCR 2.116(C)(10) de novo.[3] *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought under MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Additionally, this Court considers only

[3] In the order appealed from the trial court never stated whether it granted summary disposition pursuant to MCR 2.116(C) (8), (7) or (10). Because the parties attached documentary evidence to their briefs that the trial court considered in ruling on the motions for summary disposition, and seems to have concluded that there was no genuine issue of material fact regarding whether plaintiff's due process rights were violated, we presume that the trial court's granting of summary disposition was pursuant to MCR 2.116(C)(10). MCR 2.116(G)(5); *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

that evidence which was properly presented to the trial court in deciding the motion. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). We review constitutional issues and issues of statutory construction de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003); *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

A. CONSTITUTIONAL CLAIMS

Plaintiff's complaint alleges that his state due process rights were violated when defendants demolished the building, and that he is entitled to damages as a result. There are three reasons why plaintiff's state constitution claim was properly dismissed. First, plaintiff cannot recover damages against the city under the state constitution. Second, even if defendant could recover such damages, defendant did not commit a taking. Third, there was no genuine issue of material fact that plaintiff was not denied due process.

As defendants argue on appeal, it is well established that neither a municipality nor an individual governmental employee may be sued for monetary damages for an alleged violation of the Michigan constitution if another avenue of relief is available. *Jones v Powell*, 462 Mich 329, 335-337; 612 NW2d 423 (2000); *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001). Monetary damages are ordinarily reserved for plaintiffs who lack an alternative remedy, and a municipality's or a governmental employee's constitutional violation carries with it the ability to recover damages from the municipality or governmental employee under 42 USC § 1983. *Jones*, 462 Mich at 337. Plaintiff had at least one other avenue of relief available to him – a federal due process claim under 42 USC § 1983 – which he actually alleged in his complaint. Consequently, plaintiff may not seek monetary damages against defendants for an alleged violation of the Michigan constitution and he has failed to state a claim on which relief can be granted. MCR 2.116(C)(8). Although this result is different from that reached by the trial court, this Court will affirm where the right result was reached even if for a different reason. *Lavey*, 248 Mich App at 250.

We also hold that plaintiff's constitutional due process claims are without merit because defendants' actions did not constitute a taking. In general, a taking occurs when a governmental entity confiscates private property for public use. *Dorman v Clinton*, 269 Mich App 638, 645; 714 NW2d 350 (2006). In those situations, the constitution as interpreted by the courts requires the government to follow certain condemnation procedures and compensate the property owner. *Id*. However, this is not an absolute rule, as certain exceptions exist. One is the nuisance exception. "[T]he nuisance exception to the prohibition of unconstitutional takings provides that because no individual has the right to use his or her property so as to create a nuisance, 'the State has not "taken" anything when it asserts its power to enjoin [a] nuisance-like activity.'" *Ypsilanti v Kircher*, 281 Mich App 251, 272; 761 NW2d 761 (2008), quoting *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 491 n 20; 107 S Ct 1232; 94 L Ed 2d 472 (1987). The building in this case – which was dilapidated, missing half of its roof, and open to trespass – was a public nuisance because it "imperiled the health, safety, and welfare" of the

neighborhood. *Kircher*, 281 Mich App at 270. Therefore, defendants' demolition of the building to abate a public nuisance was a valid exercise of its police power. *Id*. at 272.

In any event, even if this claim was not barred by the foregoing, plaintiff simply cannot accurately argue that defendants violated due process when plaintiff actually received notice. The "[f]undamental requirements of due process are satisfied if a party received actual notice." *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 356 n 12; 745 NW2d 137 (2007). Plaintiff's action of seeking a demolition deferral each time defendants intended to demolish the building show that he received actual notice of the impending demolition. Although it may be unknown how plaintiff discovered that the city intended on demolishing the building, it is undisputed that defendants sent the notices to plaintiff at the address plaintiff listed on the application, and he knew about the city's intention. Additionally, plaintiff was not entitled to further notice that the city would demolish the building, for both the application he signed, as well as the city ordinance, specified that if plaintiff did not adhere to the conditions for the deferral, "the building shall be demolished without further notice." Detroit Ordinance, § 12-11-28.4(e)(7). Nothing in the record reveals that the 2005 deferral received by plaintiff was without effect, and as already noted, the condition of the building was not in compliance with the deferral requirements. Hence, there was no due process violation.

B. GROSS NEGLIGENCE

Plaintiff asserts that there is a genuine issue of material fact regarding whether defendants were grossly negligent in demolishing the building. The trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). When determining whether summary disposition is appropriate under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id*. "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

With regards to defendants Amru Mead, Director of Detroit's Buildings and Safety Engineering Department (BSED), and David Clark, Head of the Demolition Office within the BSED, government employees are immune from suit "if they were acting within the scope of their authority, were 'engaged in the exercise or discharge of a governmental function,' and their conduct did not 'amount to gross negligence that is the proximate cause of the injury or damage.'" *Miller v Lord*, 262 Mich App 640, 644; 686 NW2d 800 (2004), quoting MCL 691.1407(2)(b) and (c). "The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). "[T]he phrase 'the proximate cause' contemplates *one* cause." *Id*. at 462 (Emphasis in original.). Plaintiff failed to provide any evidence that either government employee was the most immediate and direct cause of the building's demolition.

Indeed at least one other cause existed – plaintiff's failure to adhere to the condition contained in the deferral. The trial court properly granted defendants' motion for summary disposition.[4]

C. JUDGMENT LIEN

Plaintiff's final contention is that the trial court was not authorized to enter judgment against plaintiff for the demolition costs because MCL 125.541 provides for a judgment lien against the property, not a personal judgment against a party. We review a trial court's ruling on a motion for costs for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996) aff'd 458 Mich 582 (1998). Issues of statutory construction are reviewed de novo. *Cruz*, 466 Mich at 594. MCL 125.541(7) provides:

> [i]n addition to other remedies under this act, the city, village, or township may bring an action against the owner of the building or structure for the full cost of the demolition, of making the building safe, or of maintaining the exterior of the building or structure or grounds adjoining the building or structure. A city, village, or township shall have a lien on the property for the amount of a judgment obtained under this subsection.

Because the statute provides that a lien is the remedy for a judgment received by a party for demolition costs, the trial court abused its discretion when it awarded defendants demolition costs as a personal judgment against plaintiff. Defendants are only entitled to demolition costs in the form of a judgment lien against the property. See generally *Cheboygan Co Constr Code Dep't v Burke*, 148 Mich App 56, 58-59; 384 NW2d 77 (1985) (demolition costs are recoverable as a judgment lien).

Affirmed, but remanded for entry of a judgment lien. We do not retain jurisdiction. No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[4] Gross negligence is not an exception to governmental immunity applicable to a governmental agency. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 203 n 3; 731 NW2d 41 (2007). Plaintiff's gross negligence claim against the City of Detroit was properly dismissed.